APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-5299
No. 83-5305

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RAMEX MINING CORPORATION (83-5299),
GABRIEL ENERGY CORPORATION (83-5305), - *Plaintiffs-Appellants,*

and

THE STEARNS COMPANY (83-5299), - *Intervening Plaintiff-Appellant,*

v.

JAMES WATT, Secretary of Interior;
PAUL REEVES, Acting Director;
ANDREW BAILEY, Acting Director, Office of Surface Mining Reclamation & Enforcement;
DAVID C. SHORT, Region II, Office of Surface Mining Reclamation & Enforcement, - *Defendants-Appellees.*

On Appeal From the United States District Court for the Eastern District of Kentucky.

Decided and Filed January 29, 1985

Before STEWART, Associate Justice (Retired)*, ENGEL and MERRITT, Circuit Judges.

MERRITT, Circuit Judge.

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*The Honorable Potter Stewart, Associate Justice (Retired) of the United States Supreme Court, sitting by designation.

In each of these two cases against the Secretary of the Interior, a coal mining company proposes to mine coal under the surface of land owned and maintained by the federal government as forest land. The mining company claims a valid royalty lease of the mineral estate from the successor in interest of the original owner who reserved the mineral estate when he sold the fee interest in the land to the government. Each case arises under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1983). In each, the coal mining company and the owners of the underlying royalty mineral interest seek from this Court a declaratory judgment that they are entitled to mine coal under the federal lands. In one case the coal underlies part of the Daniel Boone National Forest in Eastern Kentucky, and in the other case the land is part of the so-called "Redbird Purchase Unit" near the Daniel Boone National Forest. Plaintiffs do not seek injunctive relief or damages.[1]

The 1977 Act applies to mining on both public and private lands, but the questions of interpretation and application of the Act presented by plaintiffs here relate to one of the provisions applicable only to public lands, namely § 522(e)(2), codified as 30 U.S.C. § 1272(e)(2). That section provides, with certain exceptions which we need not enumerate here, that "subject to valid existing rights," no coal mining which disturbs the surface "shall be permitted

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[1]Plaintiffs originally sought an injunction prohibiting the Secretary from interfering with their mining operations, but have not pursued this remedy. Similarly, although plaintiffs have made a Fifth Amendment takings argument, they have not sought damages at this juncture.

. . . on any federal lands within the boundaries of any national forest . . . ."[2]

Plaintiffs request a declaratory judgment holding that section 1272(e)(2) is not applicable to the mines they intend to operate and hence that the Office of Surface Mining which administers the Act may not apply and enforce this section against them. They argue that section 1272(e)(2) does not regulate their proposed mines for the following reasons: (1) section 1272(e)(2) does not cover separate mineral interests owned by private parties under federal forests but covers only surface interests; (2) unless the section is read to exclude such private mineral estates, the section constitutes an unconstitutional taking under the Fifth Amendment; (3) the mineral estate underlying the government-owned "Redbird Purchase Unit" is not covered by section 1272(e)(2) because Redbird is not a national forest.

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[2]Section 1272(e) reads as follows:

> After August 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which exist on August 3, 1977, shall be permitted —
>
> > (1) On any lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System . . .;
> >
> > (2) On any federal lands within the boundaries of any national forest: *provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with surface mining operations and —
> >
> > > (A) Surface operations and impacts are incidental to an underground coal mine;
> > >
> > > . . . .

When the Office of Surface Mining learned that the two mining companies were about to conduct underground mining operations which would disturb the surface of federal lands, the administrator gave notice that the companies are required to seek and obtain permits under the Surface Mining Reclamation Act and would be subject to the provisions of section 1272(e)(2). When plaintiffs received these notices, they filed this action for declaratory judgment in District Court rather than participate in the administrative hearing process established by the Act. The Act prohibits the mining of coal without an administrative permit, 30 U.S.C. § 1256, and provides for administrative review and adjudication of disputes arising from permit applications. 30 U.S.C. § 1264.

The District Court overruled in part the government's motion to dismiss the complaints on grounds that plaintiffs had not exhausted their administrative remedies and that their cases were not ripe for decision. Instead, the Court rendered a partial declaratory judgment construing and applying the statute. It held that the companies' mineral interests and mining operations would operate under and on federal forest lands, and were therefore governed by section 1272(e)(2) of the Act. The District Court then agreed with the government's position regarding ripeness, and ruled that it would defer to the agency's primary jurisdiction regarding plaintiffs' further claims. However, upon motion filed by the plaintiffs, the District Court dismissed the cases in their entirety so that plaintiffs could appeal from the declaratory judgment. On appeal, the government has formally waived any exhaustion and ripeness contentions to the extent that they might be interpreted to interfere with the District Court's limited declaration, and asserts that the judgment is now ripe for decision by this Court.

Plaintiffs' first argument is that the Act, and specifically section 1272(e), does not apply to them at all, because their proposed mining operations will not occur "on federal lands." Their theory is that they still own the "lands" beneath the surface, and although the federal government has been granted some rights on the surface, the lands affected by plaintiffs' mining, including the surface land necessarily disturbed by their underground mines, are wholly owned by the private plaintiffs as a matter of state law. Proceeding from this premise, plaintiffs then claim that they cannot be made to resort to the administrative procedure that the Office of Surface Mining has set up for determination of "valid existing rights," because that process necessarily assumes that the plaintiffs' operations will occur "on federal lands."

Plaintiffs' proposal to mine beneath federal national forest lands, with the conceded attendant effects on the surface of those lands, fits squarely within the common sense meaning of the phrase "on federal lands" as used in section 1272(e)(2). This is even more apparent when the definition of "surface mining" contained in the Act, *i.e.*, "surface impacts incident to an underground mine," is substituted for the phrase "surface mining" in section 1272(e). Thus, the Act and section 1272(e) apply to plaintiffs' mines. The District Court was correct in so holding.

The plaintiffs' "taking" argument is governed by the Supreme Court's decision in *Hodel* v. *Virginia Surface Mining and Reclamation,* 452 U. S. 264 (1981), a pre-enforcement challenge to the Surface Mining Act. The Court held that the Act is not facially invalid. Its "mere enactment" does not constitute a taking of plaintiffs' mineral estate. Thus, the Court upheld the Act against the same type of attack under the Fifth Amendment as plaintiffs make in the instant case.

The Supreme Court observed that "the Act does not, on its face, prevent beneficial use of coal-bearing lands," and the coal companies "cannot at this juncture legitimately raise complaints in this Court about the manner in which the challenged provisions of the Act have been or will be applied in specific circumstances" because "there is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative review," 452 U. S. 296-97. The Court explains the hypothetical nature of the "taking" claims before it—"if appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached"—and concludes that "the potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution." *Id.* at 297 (footnote omitted). The same reasoning applies in this case. The Office of Surface Mining has not yet ruled on the questions of plaintiffs' "valid existing right" to engage in underground coal mining under section 1272(e)(2). Until an administrative disposition is made of this question, we will not know the nature of the restraint imposed by the government on plaintiffs' mining operations. Thus the District Court correctly ruled that plaintiffs' takings claim was not ripe for adjudication, and deferred to the agency's jurisdiction.

We agree with the District Court that lands within the Redbird Purchase Unit are "national forest" lands within the meaning of section 1272(e)(2). "National forest" land, primarily in the west, has been set aside for many years by the President from land in the public domain under section 24 of the Creative Act of 1891, 16 U.S.C. § 471. *See United States* v. *New Mexico*, 438 U. S. 696, 705 (1978). "National forest" land within the meaning of section 1272(e) has also been acquired, primarily in the eastern section of the United States, under section 11 of the Weeks Law of 1911, 16

U.S.C. § 521, which provides that land so acquired "shall be permanently reserved, held and administered as national forest land" just as are the western lands set aside by the President under the Creative Act of 1891. Land acquired as forest land under the Weeks Act, as distinguished from land set aside under the Creative Act of 1891, need not be formally set aside and proclaimed as national forest by the President. The acquisition of the land by the United States under the authority of the Weeks Act is sufficient to designate it as "national forest."

The "Redbird" Forest in question here is a so-called "purchase unit" acquired, held and administered as "national forest" land under the Weeks Act. The District Court was therefore correct in holding that section 1272(e) regulating coal mining in national forests governs lands within the Redbird Purchase Unit.

Accordingly, the judgment of the District Court is affirmed. Further relief not inconsistent with this opinion must be sought as an initial matter from the Secretary.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5299/5305

RAMEX MINING CORPORATION, Et Al., - - *Plaintiffs-Appellants,*

v.

JAMES G. WATT, Secretary of the Interior, Et Al., - - - - - - - - - *Defendants-Appellees.*

ORDER — Filed March 15, 1985

BEFORE: STEWART, Associate Justice (Ret.)*, ENGEL and MERRITT, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

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*Hon Potter Stewart sitting by designation from the Supreme Court of the United States.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5299/5305

RAMEX MINING CORPORATION (83-5299),
GABRIEL ENERGY CORPORATION
(83-5305), - - - - - *Plaintiffs-Appellants,*

THE STEARNS COMPANY
(83-5299), - - *Intervening Plaintiff-Appellant,*

v.

JAMES WATT, Secretary of
Interior, et al., - - - *Defendants-Appellees.*

On Appeal from the United States District Court for the Eastern District of Kentucky

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JUDGMENT—Filed January 29, 1985

Before: STEWART, Associate Justice (Retired)*, ENGEL and MERRITT, Circuit Judges.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed. Further relief not inconsistent with this opinion must be sought as an initial matter from the Secretary.

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*The Honorable Potter Stewart, Associate Justice (Retired) of the United States Supreme Court, sitting by designation.

It is further ordered that Defendants-Appellees recover from Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

(s) John Hehman
John P. Hehman, Clerk

Issued as Mandate: March 25, 1985

Costs: None

Filing fee .....$
Printing .....$
Total .....$

A True Copy

Attest:

(s) Nancy Schulkens
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil Action No. 81-12

RAMEX MINING CORPORATION - - - - - *Plaintiff,*

v.

JAMES G. WATT, Etc., Et Al. - - - *Defendants.*

Civil Action No. 81-18

GABRIEL ENERGY CORPORATION - - - - *Plaintiff,*

v.

JAMES G. WATT, Etc., Et Al. - - - *Defendants.*

MEMORANDUM — Filed November 3, 1981

These matters are before the Court on various motions of the parties: the federal defendants' April 27, 1981, and May 5, 1981, motions to dismiss, their August 6, 1981, motions for summary judgment, and their August 10, 1981, motion to dismiss the intervening complaint in London Civil No. 81-12; Ramex Mining Corporation's ("Ramex's") May 21, 1981 (motion for summary judgment in London Civil No. 81-12; Stearns Coal and Lumber Company's ("Stearns' ") August 14, 1981, motion for summary judgment in London Civil No. 81-12; and Gabriel Energy Corporation's ("Gabriel's") May 26, 1981, motion for summary judgment and its August 13, 1981, motion to amend its complaint, both in London Civil Action No. 81-18. With the

exception of Gabriel's August 13 motion to amend its complaint, all the pending motions are controverted. Fortunately, in ruling on these motions, chaos may be avoided, for the arguments are severally repeated throughout the pleadings. The Court has extracted the principal arguments from the various pleadings in this Memorandum, and disposes of them in a slightly-different order than that suggested to the Court by the parties. After a review of the record and the pleadings of counsel, the Court concludes that it has jurisdiction in these matters, that the federal defendants are entitled to partial summary judgment, and that the Court should retain jurisdiction pending administrative proceedings before the Office of Surface Mining Reclamation and Enforcement ("OSM"). Since no party has objected, Gabriel will be permitted to file its tendered amended complaint. Appropriate Orders will be entered this date.

The sole issue for resolution in both matters is whether an operator seeking to mine coal pursuant to a privately held mineral estate underlying a federally owned surface estate in a national forest is conducting a surface coal mining operation on federal lands within the meaning of Section 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e).

I. JURISDICTION OF THIS COURT

A. *Statutory Preclusion of Judicial Review.*

The federal defendants contend that this Court lacks subject matter jurisdiction because Section 526(a)(1) of the Surface Mining Act, 30 U.S.C. § 1276(a)(1), requires that this litigation be brought in the United States District Court for the District of Columbia, within 60 days after the alleged injuries, by plaintiffs who participated in the administrative process. Section 526(a)(1) is plainly ap-

plicable to any litigant seeking judicial review of the promulgation of national rules and regulations pertaining to either surface mining operations or the impacts incident to underground mining operations on federal lands. The plaintiffs' complaints and pleadings, however, evidence that the plaintiffs are not challenging either the Secretary's authority to promulgate national rules and regulations pertaining to federal lands or the validity of those regulations; rather, the plaintiffs contend simply that their private mineral estates and mining operations are not subject to the federal lands provisions of the Surface Mining Act, 30 U.S.C. §§ 1272, 1273. Since the plaintiffs are challenging the *applicability* of the federal statute and not the *validity* of the federal regulations promulgated thereunder, the Surface Mining Act's preclusion of judicial review, 30 U.S.C. § 1276(a)(1), is wholly inapplicable. Subject matter jurisdiction and venue are properly laid in the Eastern District of Kentucky. 28 U.S.C. §§ 1331, 1391(e).

The federal defendants are mistaken in their contention that the distinction between applicability and validity of federal statutes and regulations is wholly illusory. Under § 701(a)(1) of the Administrative Procedures Act, 5 U.S.C. § 701(a)(1), an agency's decisions are not reviewable when a statute precludes judicial review. Application of Section 701(a)(1) is contrary to the general constitutional presumption of reviewability of administrative action. *See, e.g., Adamo Wrecking Co.* v. *United States,* 434 U. S. 275, 289-91 (1978) (Powell, J., concurring). Where an agency is alleged to be acting outside of its mandate and the organic legislation establishing the agency also contain a statutory preclusion or limitation of judicial review, the aggrieved party has no remedy to challenge the applicability of federal regulation, unless a federal judicial forum construes the statute precluding judicial review as inapplicable. In *Adamo Wrecking Co.* v. *United States, supra,*

the Supreme Court was faced with the distinction of the applicability and the validity of federal regulations. The Court concluded that Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), the federal provision precluding judicial review under the Clean Air Act, did not apply to restrict the jurisdiction of a federal district court to determine whether federal regulation applied to the defendant's conduct in a criminal prosecution. *Id.* at 285. The Court explicitly cautioned federal district courts to avoid engaging in judicial review in a manner precluded by statutory restrictions in the organic legislation under the guise of making a determination of the applicability of federal regulation. *Id.* As the Supreme Court in *Adamo Wrecking* indicated, the distinction between the applicability and the validity of federal regulation is not illusory, and with due regard to the Supreme Court's admonition, this Court is not precluded by Section 526(a)(1) of the Surface Mining Act, 30 U.S.C. § 1276(a)(1), from exercising jurisdiction in these matters.

B. *Doctrine of Exhaustion of Remedies.*

The federal defendants contend that this Court should refrain from exercising jurisdiction in this litigation for jurisprudential considerations. They argue that the controversy is not justiciable because the plaintiffs have failed to avail themselves of all possible administrative remedies of an adverse administrative determination prior to seeking judicial review. The plaintiffs concede that they have not attempted to avail themselves of any administrative remedies to resolve these matters, but argue that the jurisprudential considerations inherent in the doctrine are irrelevant to this litigation. The plaintiffs further argue that they are under no duty to exhaust their administrative remedies because, under their interpretation of the Surface Mining Act, the agency proferring relief, OSM,

has exceeded its authority delegated to it by Congress. Plaintiffs contend it is futile for them to exhaust administrative remedies before OSM, for OSM has already determined that the plaintiffs are subject to their federal regulation pertaining to national forests. OSM's previous determination is the ultimate issue in this litigation, and that issue is currently before the Court.

It is unnecessary for the Court to determine whether the plaintiffs are under a duty to exhaust administrative remedies prior to the inception of this litigation or whether an exhaustion requirement is futile herein, for the general doctrine of exhaustion of administrative remedies before an administrative agency is subject to an exception where the principal question is solely of statutory interpretation. *McKart* v. *United States,* 395 U. S. 185, 197-99 (1969); *Frontier Airlines, Inc.* v. *CAB,* 621 F. 2d 369, 371 (10th Cir. 1980). None of the jurisprudential considerations urging restraint from the exercise of jurisdiction are applicable. The resolution of the applicability of the Surface Mining Act to the mineral estates of Ramex, Stearns, and Gabriel does not require any particular expertise unique to the OSM. *McKart* v. *United States, supra* at 198. Juducial review would not be significantly aided by any additional administrative proceedings. *Id.* at 199. Indeed, if the plaintiffs were required to pursue administrative proceedings before OSM without accruing the desired results and thereafter successfully demonstrated the inapplicability of federal regulation, the plaintiffs would suffer needless litigation expenses in the interim prior to a judgment in this forum. As in *McKart* v. *United States, supra,* there is simply no overwhelming reason for this Court to have OSM determine in the first instance whether the plaintiffs' mining operations in the Daniel Boone National Forest are subject to the Surface Mining Act.

C. *Ripeness of Compensatory Claims.*

The federal defendants contend that the plaintiffs' claims for just compensation for a deprivation of property are not ripe for adjudication. The plaintiffs concede the defendants' contention, but assert that their claims for declaratory and injunctive relief are ripe. The Court concludes that the claims for declaratory and injunctive relief are ripe, and agrees with the parties that the claims for compensation have not as yet matured. *See Hodel* v. *Virginia Surface Mining and Reclamation Association,* ___ U. S. ____, 49 U.S.L.W. 4654, 4661-62 (1981).

II. STATUTORY AUTHORTIY TO REGULATE PRIVATE MINERAL ESTATES IN THE NATIONAL FORESTS.

The task of a Court to determine whether a particular party's activity is subject to federal statutory regulation is relatively narrow. *Adamo Wrecking Co.* v. *United States, supra* at 285. The Court must first establish that Congress has the constitutional authority to regulate the specific challenged conduct. Then, the only remaining question for judicial inquiry is whether Congress has in fact chosen to regulate the specific challenged conduct. With respect to constitutional authorization, whatever doubts remain as to the constitutionality of the Surface Mining Act were laid to rest in *Hodel* v. *Virginia Surface Mining, supra,* wherein the Supreme Court concluded that Congress had not exceeded its authority under the Commerce Clause in enacting the Surface Mining Act. Both in *Hodel* v. *Virginia Surface Mining, supra, and in Hodel* v. *Indiana,* ___ U. S. ___, 49 U.S.L.W. 4667 (1981), the Supreme Court rejected broad constitutional challenges to the Act as violative of the Fifth and Tenth Amendments. Those decisions establish that Congress has the authority to enact the Surface

Mining Act, and, in particular, surface mining activities within federal lands, 30 U.S.C. §§ 1272, 1273.

It is the conclusion of this Court that Congress has chosen to regulate the conduct at issue. Section 522(e) of the Act prohibits new surface coal mining operations on federal lands within the boundaries of a national forest except where the operator can show a valid existing right to mine as of August 3, 1977. Plaintiffs contend that the regulations and requirements imposed upon "federal lands" does not apply to their interests as they own private mineral estates. If the plaintiffs were able to remove the minerals in question without disturbing the surface, clearly "federal lands," the plaintiffs' arguments and recitation of the law of property would become relevant. However, common sense indicates that the plaintiffs will by necessity disturb the surface of "federal lands" by either underground or surface (especially) mining and this disruption is what the Act is designed to regulate. This is reflected in Section 101(c) of the Act, 30 U.S.C. § 1201(c), which states:

> Many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

It appears that Congress recognized that in many instances private proprietary interests would underlie federal lands subject to the Act in issue. The legislative history of this Act demonstrates the intent of Congress to address the interests of private mineral estate holders. As stated in a Senate report concerning this Act:

> Since the mining of coal became a profitable enterprise, there have been numerous instances in which the mineral estate and the surface estates were separated, both on public and private lands. State law governs the resolution of any disputes about property rights which might arise from such separations, and this Act does not attempt to tamper with such state laws. The Committee firmly believes that all valid existing property rights must be preserved, and has no intention whatsoever, by any provision of this bill, to change such rights.

S. Rep. No. 95-128, 95th Cong., 1st Sess. (1977). While the Act reflects the decide of Congress that, in most instances, mining should not take place on federal lands, an exception was provided to take into account those persons who had valid existing rights in private mineral estates lying below "federal lands." 30 U.S.C. § 1272(e). Based upon the above discussion, it is clear that the Act in issue, as it regulates mining activities on "federal lands," should be interpreted to include regulation of those private parties who seek to mine their mineral estates underlying the national forests.

All plaintiffs are declared to be conducting underground coal mining operations which come within the provisions of 30 U.S.C. § 1272(e), as they involve surface operations and impacts incident to an underground coal mine.

III. DEFERENCE TO THE PRIMARY JURISDICTION.

Having concluded that the plaintiffs seeking to mine coal pursuant to a privately held mineral estate underlying the federally owned surface estate in the Daniel Boone National Forest are conducting a surface coal mining operation on federal lands within the meaning of Section 522(e), 30 U.S.C. § 1272(e), any further inquiry into these matters, the extent and nature of federal regulation by the OSM, is precluded by the doctrine of primary jurisdiction. The doctrine applies whenever the enforcement of claims, originally cognizable in a federal forum, requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of an administrative agency. *United States* v. *Western Pacific Railroad Co.*, 352 U. S. 59, 63-64 (1956). "[I]n such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.* at 64 (citation omitted). This litigation concerns complicated issues of fact which are not within the conventional experience of the federal judiciary. The OSM should not be passed over, for it may provide the "[u]niformity and consistency in the regulation" of surface mining activities within the national forests. *Far East Conference* v. *United States,* 342 U. S. 570, 574 (1952). The OSM is far better equipped than this Court to ascertain and interpret the extent and validity of the plaintiff's existing rights to conduct mining operations in the Daniel Boone National Forest. This Court, however, will not sustain the federal defendants' motion in full, for if OSM's regulation of the plaintiffs' mining operations is so oppressive as to amount to a deprivation of their property interests, their Fifth Amendment claims for just compensation may become ripe for adjudication. *See Hodel* v. *Virginia Surface Mining, supra* at ...., 49 U.S.L.W. at 4661-62.

In making this ruling, the Court is making no decision as to whether underground mining would so disturb the surface as to be incompatible with the goals set out in 30 U.S.C. § 1272(e), as there have been numerous underground mines in the national forest in this area in the past.

As the orders in these cases will not be final and thus not appealable, if any party desires the Court to amend its Orders to make a finding under 28 U.S.C. § 1292(b), such a motion will be given serious consideration.

This 3rd day of November, 1981.

(s) Eugene E. Siler, Jr.
Eugene E. Siler, Jr., Judge

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil Action No. 81-12

RAMEX MINING CORPORATION, - - - *Plaintiff,*

v.

JAMES G. WATT, Secretary of
The Interior, et al., - - - - *Defendants.*

Civil Action No. 81-18

GABRIEL ENERGY CORPORATION, - - - *Plaintiff,*

v.

JAMES G. WATT, Secretary of
The Interior, et al., - - - - *Defendants.*

MEMORANDUM — Filed April 1, 1983

This matter is currently before the Court for consideration of the motion by the plaintiff, Gabriel Energy Corporation (hereinafter Gabriel), for reconsideration of the Court's Order entered November 3, 1981, whereby the defendants were granted partial summary judgment. After thorough consideration, the Court is of the opinion that its previous Order was proper and should stand. An appropriate Order denying the relief requested by the plaintiff will be entered this date. Various other motions filed on behalf of Walter Fitzmartin, Jane Fitzmartin, Herman Israel, and Yvonne O'Brien, executrix of the estates of

John F. R. Clark and Madeline Clark, and the responses thereto, will also be considered below.

In response to Gabriel's request for prompt action in this matter, this Court on November 3, 1981, addressed itself to the central issue raised by the parties. While the Court was concerned with the parties' need and desire for a quick resolution, it was also aware of the importance and long-ranging effect its decision would have. Unfortunately, over a year later the major issue raised by this matter has not been finally adjudicated.

The portion of the Court's previous opinion to which Gabriel has strenuously objected is contained within the section entitled "STATUTORY AUTHORITY TO REGULATE PRIVATE MINERAL ESTATES IN THE NATIONAL FORESTS." Specifically, the plaintiff finds exception with the Court's following statement:

> If the plaintiff were able to remove the minerals in question without disturbing the surface, clearly "federal lands," the plaintiff's argument and recitation of the law of property would become relevant. However, common sense indicates that the plaintiffs will by necessity disturb the surface of "federal lands" by either underground or surface (especially) mining and that disruption is what the Act is designed to regulate.

This statement should in no way be construed to mean that the government, by virtue of its ability to regulate mining activities on federal lands, will be able to preempt totally the plaintiff's rights in the mineral estate once valid rights are established through appropriate administrative procedures. However, at this juncture of this prcoeeding, that issue is not ripe for consideration.

The ability of the government to regulate mining activities which have an impact on federal lands within the boundaries of national forests evolves from the authority

of the Surface Mining Control and Reclamation Act of 1977 (hereinafter Act) and *not necessarily* by virtue of the fact that the government holds the interest of the surface estate which it seeks to regulate. In previously addressing this issue, Gabriel has amply set forth the law relevant to the rights held by the owner of a mineral estate as compared with the rights held by the owner of the surface estate. The Court's holding that this regulation is binding on the owner of private mineral estates, encompassing both rights on the surface and the underlying strata, does not beg the question as the plaintiff suggests. The central question becomes not whether the interest in the private mineral estate is dominant to that of the owner of the surface estate but whether the government has chosen to regulate mining upon or beneath the surface in question. After careful consideration, the Court has determined that the Act does indeed regulate such mining activity and that the definition of federal lands contained within the Act is consistent with such regulation. The legislative history of the Act supports such a finding. While the Act should not be construed to extinguish existing property rights, the government's ability to regulate as prescribed within the Act may not be ignored.

OTHER PENDING MOTIONS

On July 30, 1982, a hearing was held in this matter to allow all parties the opportunity to summarize their arguments regarding the plaintiff's motion for reconsideration. After hearing all parties, the Court granted counsel for *Amici Curiae* an additional period of five days to supplement their argument. The federal defendants were given ten days thereafter in which to advise the Court of their position as to the suggestion by Gabriel that the complaint be dismissed so that it may appeal the dispositive issue to the United States Court of Appeals for the Sixth Circuit.

Following the hearing, the *Amici Curiae* were joined as parties-plaintiff in this action (hereinafter plaintiff mineral owners). Thereafter, the following motions and responses were filed by the respective parties:

Motion for Extension of Time in which to File Supplement to the Record and Response to Federal Defendants' Motion to Join Parties Plaintiff (filed by the plaintiff mineral owners on August 13, 1982);

Motion to Join Parties Defendant (filed by the plaintiff mineral owners on August 13, 1982);

Request for Ruling and Judgment on Dispositive Issues in Consolidated Case (filed by the plaintiff mineral owners on August 13, 1982);

Objection to Plaintiff Mineral Owners' Motions and Request (filed by Gabriel on August 17, 1982);

Motion to Reset Time for Extension of Time for Submission of Motion for Reconsideration of Order (filed by plaintiff mineral owners on August 19, 1982);

Objection to Plaintiff Mineral Owners' Motions and Requests or Alternatively Motion for Time to Respond (filed by federal defendants on August 19, 1982);

Objection to Motion to Reset Time, etc., and Motion to Close the Record to Deny Further Filings (filed by Gabriel on August 29, 1982);

Motion to Amend Motion for Extension of Time in which to File Supplement to Record and Response to Federal Defendants' Motion to Join Parties Plaintiff (filed by plaintiff mineral owners on October 29, 1982); and

Motion for Extension of Time in which to File Response to Objection of Federal Defendants to Plaintiff Mineral Owners' Motion and Requests and Response

to Objections of Gabriel to Motion and Request and Motion to Reset Time, etc., and Motion (filed by plaintiff mineral owners on October 29, 1982).

Initially, the Court must note that it does not look with favor upon the delays which have resulted from the various late filings by the plaintiff mineral owners. However, after reviewing these materials, the Court concludes that none of the parties herein will be prejudiced by allowing the materials submitted by the plaintiff mineral owners to be considered. For the sake of clarity and brevity, all materials heretofore tendered by the plaintiff mineral owners will be allowed to be filed. Objection to these materials by the remaining parties will be overruled. Further, the Court does not deem it necessary to require the remaining parties to address any new matter which may have been raised by these materials. Therefore, the Court will proceed to address the issues raised by the plaintiff mineral owners.

Before considering the gravamen of the plaintiff mineral owners' supporting authority, the Court will address the motion to add additional defendants. After reviewing the materials submitted by the parties in regard to this issue, the Court finds the plaintiff mineral owners' motion to add additional defendants to be improper. The movant has not shown to the satisfaction of the Court that the failure to add the Secretary of the Department of Agriculture and the Chief of the Forest Service will impair or impede the parties' ability to protect their respective interests or subject any party to a substantial risk of an inconsistent obligation. Rule 19(a), Fed. R. Civ P. Thus, the motion to add additional defendants to this action will be denied.

As set forth in the affidavit of counsel for the plaintiff mineral owners, their interest in this litigation arises by

virtue of the fact that they own in fee simple the mineral estate in approximately 9,000 acres of land wherein the surface estate is owned by the United States. These 9,000 acres are located within the Redbird Purchase Unit, although not specifically designated as a part of the Daniel Boone National Forest. The crux of their argument centers on the issue of whether purchase units should be considered as being included within the definition of national forests as set forth in section 522(e) of the Act, 30 U.S.C. § 1272(e). The Court has reviewed the materials submitted by the plaintiff mineral owners and finds much of it to be inconclusive as to the issue herein being considered. A review of the legislative history and the various enactments creating and affecting the national forest lands convinces the Court that the position set forth and argued by the plaintiff mineral owners is erroneous.

The Court is also unpersuaded by the plaintiff mineral owners' argument that, inasmuch as the various agencies of the defendants have made a distinction, via their regulations, between national forests and purchase units, they are now bound by their regulations, citing inter alia, *United States* v. *Nixon*, 418 U. S. 683 (1974). The Court has reviewed this issue and finds that the differences which exist are merely for administrative convenience and do not alter the intent of Congress.

In pertinent part, section 522(e) of the Act provides:

> After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—
>
> . . . (2) on any Federal lands within the boundaries of any national forest: *Provided, however,* that surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values

> which may be incompatible with surface mining operations. . . .

30 U.S.C. § 1272(e). Examination of the legislative history of this section is relevant in resolving the issue herein being raised by the plaintiff mineral owners. The Conferees' Report states at Cong. Rec. 38281 (Dec. 5, 1974):

> 7. Designation of Areas Unsuitable for Surface Coal Mining.—Both the Senate bill and House amendment provide for the establishment of a process by which regulatory authority could designate land areas as unsuitable for the surface mining of coal. In addition to the prohibition of surface mining which may result from the operation of the designation process, certain outright prohibitions were included in the Senate bill and House amendment. Thus both the Senate bill and House amendment would prohibit new surface coal mining operations on lands within the National Park System, the National Wilderness Preservation System and the House amendment contained additional bans applicable to the National Forest System (including national grasslands) and alluvial valley floors.
>
> The conferees adopted certain of the statutory prohibitions (e.g., lands within the National Park System, National Wildlife Refuge System, National Wilderness System), and modified others (rejected the prohibition applicable to national grasslands but retained a ban on National Forests). . . .

Although this proposed Act eventually received a presidential veto, the prohibitions contained in the 1977 Act are the same. The intention of Congress clearly appears to be the protection of all areas of the National Forest System with the exclusion of the national grasslands. This intent would

be frustrated were the Court to adopt the meaning urged by the plaintiff mineral owners. The term National Forest System has been defined by the plaintiff mineral owners as follows:

> All National Forest lands reserved or withdrawn from the public domain of the United States, all National Forest lands acquired through purchase, exchange, donation, or other means, the National Grasslands and Land Utilization Projects administered under Title III of the Bankhead-Jones Farm Tenant Act (citations omitted) and other lands, waters, or interests therein which are administered by the Forest Services or are designated for administration through the Forest Service as a part of the system.

This definition, taken from Forest Service Manual 5405.4 is also included within the definition cited by the defendants taken from the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended, 16 U.S.C. § 1609(a). Either definition is broad enough to include purchase units which were acquired pursuant to the Weeks Act of 1911. Therefore, even if national grasslands are excluded from coverage as reflected by congressional intent, purchase units remain and are protected by section 522(e).

Additionally, unlike purchase units which may, in time, be designated as a specific national forest, national grasslands do not have national forest status. While they are administered by the Forest Service and are a part of the National Forest System, their acquisition arose from the Bankhead-Jones Farm Tenant Act, 7 U.S.C. § 1010. Contrary to the Weeks Act which has as a primary purpose proper timber management and protection of waterways and watersheds, the Bankhead-Jones Farm Tenant Act was designed primarily to restore soil management and prevent soil erosion in areas of the Midwest and Great Plains which

had resulted from improper land use. While exclusion of national grasslands from section 522(e)(2) of the Act does not frustrate the intent of the Act, exclusion of purchase units from this same section would frustrate the intention of the Weeks Act as well as the Surface Mining Control and Reclamation Act of 1977.

Based upon a plain reading of the statutory section as well as its underlying legislative history, the Court finds that areas designated as purchase units come within the meaning of national forests as set forth in section 522(e)(2) of the Act. Further, after considering all parties' respective position regarding dismissal of this action so that an appeal may be taken and finding the issues considered herein to be dispositive, this matter will be dismissed this date by separate Order, as the Court finds that the plaintiffs are conducting underground coal mining operations which come within the provisions of 30 U.S.C. § 1272(e), as they involve surface operations and impacts incident to an underground coal mine. Moreover, in accordance with the oral motion by the plaintiff, judgment will be entered denying the plaintiffs' claims of a taking, as they are not ripe for adjudication. *Hodel* v. *Virginia Surface Mining,* 452 U. S. 264 (1981).

This 1st day of April, 1983.

(s) Eugene E. Siler, Jr., Judge

APPENDIX F

[LETTERHEAD OF UNITED STATES DEPARTMENT OF THE INTERIOR]
January 23, 1981

Mr. Douglas Arnett
Gabriel Energy Corporation
Route 1, Box 476
Oneida, Kentucky 40972

Dear Mr. Arnett:

Thank you for meeting with us on the 20th regarding Permit No. 0955003. I am especially grateful for your notifying me of the commencement of the referenced operation.

As I indicated at that time, because this operation is being conducted on Federal (surface) land in the Daniel Boone National Forest, either a determination of valid existing rights or a compatibility finding is required before it may be performed lawfully. These requirements are found in Section 522(e) of the Surface Mining Control and Reclamation Act of 1977.

Your discontinuing the operation and stabilizing the mine site pending the determination of the issues involved and your all-around candor and good faith are both commendable and very much appreciated. You may rest assured that I and my staff look forward to providing you with whatever assistance you require as you work toward resolving these matters.

Sincerely yours,

(s) David C. Short
David C. Short
Regional Director

cc:

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Frankfort, KY. 40601

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